



EUROPEAN
COMMISSION

Brussels, **XXX**
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COMMISSION IMPLEMENTING REGULATION (EU) .../...

of **XXX**

for the application of Regulation (EU) 2015/2120 of the European Parliament and of the Council as regards fair use, based on typical usage patterns, and anti-fraud measures for intra-EU communications

(Text with EEA relevance)

This draft has not been adopted or endorsed by the European Commission. Any views expressed are the preliminary views of the Commission services and may not in any circumstances be regarded as stating an official position of the Commission.

COMMISSION IMPLEMENTING REGULATION (EU) .../...

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for the application of Regulation (EU) 2015/2120 of the European Parliament and of the Council as regards fair use, based on typical usage patterns, and anti-fraud measures for intra-EU communications

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and retail charges for regulated intra-EU communications and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union¹, and in particular Article 5a(8) thereof,

Whereas:

- (1) The retail price caps for intra-EU communications established in Article 5a(1) of Regulation (EU) 2015/2120, which entered into force in all Member States on 15 May 2019, were set at a level that allowed providers of publicly available number-based interpersonal communications services to recoup their costs, thus ensuring a proportionate intervention on both the mobile and fixed communications market. Those measures, which were set to expire on 14 May 2024 pursuant to Article 10 of Regulation (EU) 2015/2120 as amended by Regulation (EU) 2018/1971 of the European Parliament and of the Council,² aimed at ensuring that consumers were not charged excessive prices for intra-EU communications.
- (2) Article 10(5) of Regulation (EU) 2015/2120 extends the application of the retail price caps for intra-EU communications until 30 June 2032. Pursuant to Article 5a(9) of the same Regulation, by 30 June 2027, the Commission should review Article 5a and may, if appropriate, decide to submit a legislative proposal with a view to amend it.
- (3) Pursuant to Article 5a(8) of Regulation (EU) 2015/2120, providers that voluntarily decide not to apply different retail prices to consumers for domestic and intra-EU communications are to be exempt from applying the maximum retail price caps set for intra-EU communications, subject to a fair use policy. In such case, they are to be exempt from regulated prices for intra-EU communications. A fair use policy is a safeguard that should allow providers to deviate from the converged prices and apply surcharges, if consumers' usage of intra-EU communications exceeds the conditions

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¹ OJ L 310, 26.11.2015, p. 1.

² Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009, OJ L 321, 17.12.2018, p. 1.

that the provider has set to define typical usage of intra-EU communications in a given Member State.

- (4) First, the conditions defining typical usage should specify volumes of intra-EU communications that allow consumers to consume a number of units for intra-EU calls and SMS messages, charged at the applicable domestic retail prices, that are consistent with their respective tariff plans and that are sufficient to cover a broad range of usage patterns of consumers, including in particular consumers with a relatively high consumption of intra-EU communications per month that continue to rely on traditional communications such as telephone calls or SMS messages. Second, the conditions defining typical usage should specify their application period. This defined application period should be equal to one billing period at the minimum, but it could extend to several billing periods specified by the provider. Providers may fix volume consumption limits applicable to one or several period within the application period. Third, the same conditions defining typical usage should apply across all tariff plans of the provider in a Member State.
- (5) The fair use policy should, on the one hand, provide consumers with appropriate volumes of intra-EU calls and SMS messages and, on the other hand, allow for future adjustments based on market conditions and consumers' behaviour. Typical usage of intra-EU calls and SMS messages may vary, *inter alia*, depending on the type of consumer, the provider, or the Member State.
- (6) Therefore, the typical usage conditions should allow providers sufficient margin of flexibility to set a fair use policy they consider suitable and that is compliant with this Implementing Regulation and at the same time, allow for future adjustments based on market conditions and consumers' behaviour.
- (7) Intra-EU communications are different in nature from roaming and their intended usage is different. Contrary to intra-EU communications, regulated roaming is a cross-border service intended for periodic travelling and not for permanent use. Therefore, roaming is at risk of anomalous and abusive usage for purposes other than intended, while intra-EU communications are at risk of usage beyond typical usage. The notion of usage exceeding typical usage of intra-EU communications is hence different from the notion of "anomalous and abusive" usage of retail roaming services at domestic prices, as defined in Article 5 of Regulation (EU) 2022/612 of the European Parliament and of the Council³ that refers to the usage of regulated retail roaming services by roaming customers in a Member State other than that of their domestic provider for purposes other than periodic travel and for which a fair use policy can be applied.
- (8) The fair use policy should not affect the right of providers to take measures to tackle anti-fraud measures if the voluntary decision not to apply retail prices to consumers for intra-EU communications different than for domestic communications leads to fraudulent usage. Providers of electronic communications service to the public should be allowed to detect and prevent that third parties exploit the fair use policy for price arbitrage to gain an economic advantage (e.g. International Revenue Share Fraud, abusive use of SIM cards). Such measures should be proportionate and may include, *inter alia*, the monitoring of traffic patterns to detect anomalies that may indicate

³ Regulation (EU) 2022/612 of the European Parliament and of the Council of 6 April 2022 on roaming on public mobile communications networks within the Union, OJ L 115, 13.4.2022, p. 1.

fraudulent or abusive use, or the temporary suspension of the service pending verification of the usage.

- (9) At the same time, consumers should be protected from measures that may affect in any manner their ability to use intra-EU communications. In this respect, all consumer rights deriving from Directive 2011/83/EU of the European Parliament and of the Council⁴ on consumer rights are applicable. In accordance with Article 102 of Directive (EU) 2018/1972 of the European Parliament and of the Council,⁵ contractual clauses providing for a fair use policy are to be clearly communicated to consumers before they become applicable.
- (10) In addition, before a consumer's consumption of intra-EU communications exceeds the typical usage, providers should alert consumers of such usage in the manner detailed in advance in the consumers' contracts. In any event, such measures should minimise administrative burden for consumers and limit the number of unnecessary alerts.
- (11) The Body of European Regulators for Electronic Communications was consulted as per Article 5a(8) of Regulation (EU) 2015/2120.
- (12) The measures provided for in this Regulation are in accordance with the opinion of the Communications Committee.

HAS ADOPTED THIS REGULATION:

Article 1
Fair use policy

- 1. The fair use policy shall allow providers of electronic communications to the public to apply a safeguard when a consumer's usage of intra-EU communications exceeds the typical usage.
- 2. To benefit from the fair use policy safeguard, a provider of electronic communications to the public shall set the conditions defining the typical usage of intra-EU communications for a minimum defined duration of one billing period, and across all its tariffs' plans in a Member State.
- 3. The conditions defining the typical usage of intra-EU communications shall be based on volumes of intra-EU communications that are significantly higher than the average number of intra-EU minutes or SMS consumed per month per consumer in a Member State as reported in the latest Intra-EU communications BEREC Benchmark report available at the time the conditions are set. In case there is no benchmark available for a Member State, the provider shall use the EU average figures.
- 4. When in a defined period a consumer's usage of intra-EU communications deviates from the conditions defining typical usage, providers may charge additional charges only to the intra-EU communications units concerned until the end of the defined period in which such deviation occurs.

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⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p. 64.

⁵ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ L 321, 17/12/2018, p. 36.

5. This fair use policy shall apply separately for intra-EU calls, for fixed and mobile calls, and for intra-EU SMS messages.
6. National regulatory authorities shall monitor and enforce the correct application of the safeguard.

Article 2

Anti-fraud measures

Providers of intra-EU communications may apply anti-fraud measures to detect fraudulent usage related to the voluntary decision to apply equal retail prices for domestic and intra-EU communications. Where the provider detects fraudulent activity and decides that measures are needed to tackle promptly the suspected fraud, the provider shall notify the relevant national regulatory authority as soon as possible, and, in any event, within 5 working days following the adoption of the measures.

Article 3

Consumer protection

1. When a provider of intra-EU communications applies a fair use policy, it shall include in the contracts with consumers drawn pursuant to Article 102 of Directive (EU) 2018/1972, the terms and conditions associated with that policy and in particular, the surcharges per intra-EU call and SMS that may apply to the consumption of intra-EU communications exceeding the typical usage. In addition, where a provider has evidence that a consumer has used 80% of a typical usage limit, it shall immediately alert the consumer of the risk of triggering surcharges and of the surcharges applicable.
2. Consumers shall have the right to appeal the decisions taken by the provider of intra-EU communications, including thorough conciliation and competent out-of-court dispute resolution bodies as referred to in Article 25 of Directive (EU) 2018/1972.

Article 4

BEREC benchmark transitional period

1. BEREC shall update the benchmark for intra-EU communications to ensure that in the future it reports all usage of intra-EU communications. The updated benchmark report shall be available in October 2026.
2. Until the updated benchmark report is available, providers shall use the latest available Intra-EU communications BEREC Benchmark report.

Article 5

Entry into force

This Regulation shall enter into force on the [...] day following that of its publication in the *Official Journal of the European Union*.

It shall apply until 31 December 2028.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President
Ursula VON DER LEYEN

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